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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOHN S. TOLL, PRESIDENT, UNIVERSITY OF MARYLAND,

and

UNIVERSITY OF MARYLAND,

Petitioners,

v.

JUAN CARLOS MORENO ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the University of Maryland's policy of denying the benefits of in-state status to aliens holding nonimmigrant "G-4" visas (under 8 U.S.C. § 1101(a)(15)(G)(iv)) even when they are domiciled in Maryland, while granting such benefits to citizens and immigrant aliens domiciled in Maryland, creates a classification based on alienage that violates the Equal Protection Clause of the Fourteenth Amendment.

2. Whether the University's above-mentioned policy with respect to aliens holding G-4 visas violates the Supremacy Clause on either of the following grounds: (a) that it interferes with Congress's exclusive control over immigration by imposing upon visaholders allowed by Congress to be domiciled in this country discriminatory burdens not contemplated by Congress; or (b) that, as applied to G-4 visaholders who are exempt from federal and state income taxes on their official salaries under international agreements to which the United States is a party, the policy interferes and conflicts with an objective of those international agreements.

3. Whether the courts below correctly held that, for the two-year period between the District Court's initial order and the University's "Clarifying Resolution" of June 23, 1978, the University's policy of refusing to allow aliens holding G-4 visas to prove Maryland domicile for the purpose of obtaining the benefits of in-state status, while at the same time basing the award of such status on Maryland domicile, created an irrebuttable presumption in violation of the Due Process Clause of the Fourteenth Amendment.

4. Whether the courts below correctly held that the University is required to make refunds of tuition differentials to respondents and members of their class for the period between the date of the first injunctive order in 1976 and the date of the most recent injunctive order in 1980, on the ground that the University had agreed to such refunds as a condition of a stay pending appeal and thus waived any Eleventh Amendment immunity.

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STATEMENT OF THE CASE

The Immigration and Nationality Act of 1952, as amended, 8 U.S.C. § 1101 *et seq.*, divides aliens to be admitted into the United States into two general categories: immigrant aliens, who are admitted for permanent residence; and nonimmigrant aliens, who are permitted to enter the United States under twelve different classifications, 8 U.S.C. § 1101(a)(15)(A)-(L), which correspond to the different visas that they hold.

The University of Maryland's In-State Policy at issue here (P.A. 167a-171a)[1] governs the award of in-state status for purposes of obtaining the lower, in-state tuition and fee rates at the University and for purposes of obtaining more favorable treatment for admission to the University. That policy allows citizens and immigrant aliens to obtain such in-state status upon a showing that they (or the persons upon whom they are financially dependent) are domiciled in Maryland, but it prohibits all nonimmigrant aliens from obtaining in-state status.

Respondents are nonimmigrant aliens who hold what are called "G-4" visas (or are dependents of such G-4 visaholders). G-4 visas are those issued to nonimmigrant aliens admitted under 8 U.S.C. § 1101(a)(15)(G)(iv) as "officers, or employees of . . . international organizations [entitled to enjoy privileges and immunities under the International Organizations Immunities Act, 59 Stat. 669, 22 U.S.C. § 288 *et seq.*], and the members of their immediate families." In particular, the named respondents are (or were at the time of suit) dependents of employees of the Inter-American Development Bank or of the International Bank for Reconstruction and Development (World Bank) (P.A. 14a-15a, J.A. 55A). These organizations, and the other public international organizations to which 8 U.S.C. § 1101(a)(15)(G)(iv) applies,

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[1] The Appendix to the Petition for Writ of Certiorari is cited in this brief as "P.A."; the Joint Appendix as "J.A."; and the Brief of Petitioners as "Pet. Br." Petitioners University of Maryland and its President, John S. Toll, are referred to herein as "the University."

are established pursuant to treaties or international agreements to which the United States is generally a party. The G-4 visaholders employed by these organizations are exempt from federal, state, and local income taxes on their salaries from such organizations. This exemption is established by the treaties or international agreements creating the organizations or by virtue of federal and state statute, and cannot be waived by the individual employees.[2] These employees, however, are subject to *all other* federal, state, and local taxes, including income taxes on all income other than their international-organization salaries.

Since the respondents were prohibited from obtaining in-state status under the University's policy of exclud-

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[2] In the case of the international organizations employing the respondents' fathers, as well as several other public international organizations, the tax exemption on the employees' salaries from the organizations is provided by the treaties or agreements establishing the organizations and applies both to the G-4 employees of the organizations and to immigrant aliens employed by the organizations. See Addendum A hereto, which lists the organizations with such treaty-based tax exemptions and cites and quotes the relevant provisions of the treaties or agreements establishing the exemptions. Such tax exemptions are for the benefit of the international organizations and their member nations and cannot be waived by individual employees. 41 Op. Atty. Gen. 170, 172-73 (1954); Treas. Reg. § 1.893-1(c)(2). (These exemptions also apply to U.S. citizens working for such organizations in other countries.)

For the other public international organizations covered by the International Organizations Immunities Act ("IOIA"), their G-4 employees are exempt from federal taxes by virtue of the IOIA itself (§ 4(b), 59 Stat. 670, amending Internal Revenue Code, now codified at 26 U.S.C. § 893) and are exempt from Maryland income tax by operation of Md. Ann. Code, art. 81, § 280(a) (taxable net income on state returns equals federal adjusted gross income). There is no provision for these G-4 visaholders to waive either such statutory tax exemption, although such waiver is required for *immigrant* visaholders employed by these organizations (which do not have a treaty-based tax exemption) if they wish to remain in immigrant status. See 8 U.S.C. § 1257; Treas. Reg. § 1.893-1(b)(4). See also p. 25, n.21, *infra*.

ing all nonimmigrant aliens, they brought the instant class action in 1975 challenging that policy as applied to them and to the class of G-4 visaholders (or dependents of such visaholders). They attacked that policy on due process, equal protection, and Supremacy Clause grounds, arguing that they and their fathers were domiciled in Maryland and that the University was violating those constitutional provisions by treating them differently from other Maryland domiciliaries. The University, however, attempted to justify its flat exclusion of all nonimmigrants (including respondents) from in-state status on the ground that that exclusion simply represented a proper implementation of the state law of domicile. According to the University, its In-State Policy was based on domicile and the reason that nonimmigrant aliens were excluded was that they could not be domiciled in Maryland under state law. (See P.A. 79a and the University's representations to this effect quoted in Addendum B hereto, pp. 4a-6a.) With specific reference to respondents, the University argued that G-4 visaholders were necessarily precluded by the terms and conditions of their visas from being domiciled in Maryland (J.A. 29A-30A, P.A. 78a-79a).

In its decision of July 13, 1976, the District Court rejected that contention, holding that nothing in either federal immigration law or the Maryland law of domicile prevented a G-4 visaholder from being domiciled in Maryland (P.A. 79a-88a). The court concluded that the University's policy created an irrebuttable presumption of non-domicile that was not necessarily true for G-4 visaholders, and thus denied those visaholders due process of law under *Vlandis* v. *Kline*, 412 U.S. 441 (1973). (P.A. 88a-89a, 98a.)[3] The court enjoined enforcement of the policy with respect to the named plaintiffs and the members of their class (P.A. 98a-99a), but stayed its order pending appeal, on the basis of the University's repre-

[3] The District Court certified this case as a class action on behalf of G-4 visaholders, or dependents of such visaholders, attending or interested in attending the University (P.A. 97a-98a).

sentations that it would make appropriate refunds if the case was "finally affirmed on appeal" (P.A. 99a-100a). The Court of Appeals affirmed (P.A. 101a-102a).

On writ of certiorari, this Court confirmed that *Vlandis* squarely governed this case, and it then proceeded to examine the question whether G-4 visaholders could be domiciled in Maryland. *Elkins* v. *Moreno*, 435 U.S. 647, 660-62 (1978) (P.A. 116a-118a).[4] This Court held that, unlike most nonimmigrant aliens, G-4 visaholders (along with a few similar categories of nonimmigrant visaholders) were not precluded by federal law from being domiciled in the United States. 435 U.S. at 663-68 (P.A. 119a-124a). The Court observed that with respect to most of the twelve major categories of nonimmigrant aliens listed at 8 U.S.C. § 1101(a)(15)(A)-(L), Congress "expressly conditioned admission" on the alien's "intent not to abandon a foreign residence or, by implication, on an intent not to seek domicile in the United States." 435 U.S. at 665 (P.A. 121a). It listed, as examples, the holders of the following nonimmigrant visas: B (temporary visitors), F (foreign students), C (aliens in immediate and continuous transit), D (vessel crewmen landing temporarily), and H (temporary workers). *Id.* By contrast, this Court noted, "Congress did *not* restrict every nonimmigrant class" and, in particular, placed no such restrictions on the intent of G-4 visaholders. 435 U.S. at 666 (P.A. 122a).[5] Accordingly, the Court stated, Congress "was willing to allow nonrestricted nonimmi-

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[4] In this Court, the University continued to press its position that its In-State Policy was based on domicile and that G-4 and other nonimmigrant visaholders were lawfully excluded because they could not be domiciled in Maryland under state law. See the University's representations quoted in Addendum B, pp. 7a-8a, and this Court's recognition that the state law of domicile was the basis of the University's policy, 435 U.S. at 658-60 (P.A. 114a-116a).

[5] Other unrestricted nonimmigrant categories include E (aliens admitted under certain treaties of commerce) and I (certain foreign media representatives).

grant aliens to adopt the United States as their domicile." 435 U.S. at 666 (P.A. 122a).

Having resolved that question of federal law, this Court certified to the Maryland Court of Appeals the "potentially dispositive" question whether G-4 visaholders are "incapable *as a matter of state law* of becoming domiciliaries of Maryland." 435 U.S. at 669 (P.A. 124a-125a) (emphasis added). That court, in *Toll* v. *Moreno*, 284 Md. 425, 397 A.2d 1009 (1979) (P.A. 137a), answered the certified question "No," stating that "nothing in the general Maryland law of domicile renders G-4 visaholders, or their dependents, incapable of becoming domiciled in this State" (P.A. 156a).

Thus, it is clear that G-4 visaholders can be lawfully domiciled in the United States and in Maryland. Of course, not every G-4 visaholder residing in Maryland will be domiciled there; such individuals must still meet the general test for Maryland domicile (based on intent) discussed by the Maryland Court of Appeals in *Toll* v. *Moreno*, *supra* (P.A. 149a-153a). The important fact is that such visaholders, unlike most nonimmigrants, are capable of establishing domicile in Maryland under federal and state law, and that it is only the relatively small number of nonimmigrant visaholders in this situation, rather than the general class of nonimmigrants, who might qualify for in-state status if subject to the same test of domicile as citizens and immigrant visaholders.

The University, however, did not simply accept these decisions and apply its test of domicile to all students (or their parents) who could be domiciled in Maryland, including the G-4 visaholders. Rather, on June 23, 1978, the University adopted a "Clarifying Resolution" (P.A. 172a-175a). That resolution did not purport to amend the In-State Policy; indeed, it specifically "reaffirmed" that policy (¶ 4). It stated, however, that the policy had adopted a definition of domicile that excluded all nonimmigrant aliens (even those who could in fact be domiciled in Maryland under federal law and Maryland

law) (¶ 2), and that that policy served a number of purposes and interests "whether or not it conforms to the generally or otherwise applicable definition of domicile under the Maryland common law" (¶ 3). Obviously, this resolution was not necessary to exclude the great majority of nonimmigrants from in-state status; they would have been excluded under an even-handed test of domicile. Rather, the resolution affected only the G-4 and similar visaholders who could otherwise have qualified for in-state status under the test of domicile applicable to citizens and immigrant aliens.

When the case returned to this Court from the Maryland Court of Appeals, the University advised this Court of the adoption of the Clarifying Resolution and requested further briefing and argument (J.A. 34A-35A). Without further briefing, however, this Court issued its *per curiam* opinion in *Toll* v. *Moreno*, 441 U.S. 458 (1979) (P.A. 157a-160a), vacating the judgment of the Court of Appeals and remanding the case to the District Court "for further consideration in light of our opinion and judgment in *Elkins*, the opinion and judgment of the Maryland Court of Appeals in *Toll*, and the Board of Regents' clarifying resolution of June 23, 1978." 441 U.S. at 462 (P.A. 160a).

Following the remand from this Court, the District Court and the Court of Appeals again held in favor of respondents in the decisions which the University challenges here.[6]

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[6] The University and the *amici curiae* supporting its position have greatly overstated the impact of those decisions. Despite the University's assertions regarding the number of nonimmigrant aliens in the University, the State, and the country (Pet. Br. 5 n.3, 6, 27 n.20), and contrary to the *amici*'s fears that the decisions below would force state universities to allow large numbers of nonimmigrants to obtain in-state status (Br. of Ala. *et al.* 3; Br. of Amer. Coun. on Educ. *et al.* 12), the lower courts' decisions would not affect most nonimmigrants. As indicated above, the only nonimmigrants affected are those capable of establishing domicile in the State (under federal and state law), and they are only a small

SUMMARY OF ARGUMENT

1. *Equal Protection.* The courts below held that the University's In-State Policy, both before and after the 1978 Clarifying Resolution, violates the Equal Protection Clause. That holding rests firmly on the established principle that state classifications based on alienage are inherently suspect and subject to strict judicial scrutiny. This principle applies even when the enactment discriminates only against a sub-class of aliens rather than against all aliens, so long as the enactment "is directed at aliens and . . . only aliens are harmed by it." *Nyquist* v. *Mauclet*, 432 U.S. 1, 9 (1977). The University's In-State Policy falls within this proscription. It allows citizens and immigrant aliens to obtain in-state status upon a showing of domicile in the State but prohibits nonimmigrant aliens from doing so. This policy does not raise questions regarding nonimmigrants generally, since most would be unable, by virtue of federal law, to show domicile in any event. Rather, the policy discriminates only against those nonimmigrant aliens, such as G-4 visaholders, who can be and are domiciled in Maryland. Among Maryland domiciliaries they are the only ones precluded from obtaining in-state status regardless of domicile. The policy thus draws a distinction based solely

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fraction of the total number of nonimmigrants. For example, of the 554 nonimmigrant students registered at the University in the fall of 1979, only 72 were G-4 visaholders, and the great majority of the others fell into visa categories that preclude domicile in this country (J.A. 52A-53A).

The University and its supporting *amici* also assert that the University's In-State Policy is common to "most public colleges and universities" in the country (Pet. Br. 5; Br. of Ala. *et al.* 3, 10; Br. of Amer. Coun. on Educ. *et al.* 5, 9). This assertion is also misleading. We showed in our Supplemental Brief for Respondents in Opposition that many state universities—including most in the two areas with most, if not all, G-4 visaholders (*i.e.*, the Washington, D.C., and New York City areas)—have policies that would expressly allow or would appear to allow the holders of G-4 and similar nonimmigrant visas that permit U.S. domicile to obtain in-state status if they can show that they are domiciled in the State. Supp. Br. for Resp. in Opp. at 4-5 & App. A.

on alienage. Even though this classification does not harm *all* aliens, it is directed at a sub-class of aliens and harms *only* aliens. Hence, strict scrutiny is required.

The University argues that this classification should not be subject to strict scrutiny because the discrimination is against nonimmigrant, rather than immigrant, aliens. But the rationale for strict scrutiny is not so limited. At the least, strict scrutiny should apply where, as here, the State subjects nonimmigrant aliens *domiciled in the State* to burdens not imposed on other state domiciliaries. None of the other reasons advanced by the University for why strict scrutiny should not apply here is persuasive.

The University concedes that its policy cannot withstand a test of strict scrutiny, and that concession is clearly correct. Moreover, even under a less stringent test, the interests asserted by the University cannot justify its classification between citizens and immigrants domiciled in Maryland and G-4 and similar nonimmigrants who are likewise so domiciled. Although some of these nonimmigrant visaholders (such as G-4's) are partially exempt from state income taxes, that exemption is insufficient to justify the University's classification, when these domiciliaries may make significant contributions to the State and when the University makes no effort to classify other state domiciliaries on the basis of their tax liability or payments.

2. *Supremacy Clause.* The University's In-State Policy violates the Supremacy Clause for two reasons.

(a) It impermissibly encroaches upon the exclusive federal power over immigration by imposing upon a class of aliens lawfully admitted to and domiciled within the United States a discriminatory burden not contemplated by Congress in admitting them. Where Congress has decided that a class of nonimmigrant aliens is to be admitted to this country on terms that permit them to be domiciled here, a State may not, on account of their immigration status, subject them to restrictions that it does not

impose on other state domiciliaries (at least where, as here, the State's basic political or governmental functions are not involved).

(b) In addition, the University's policy, as applied to G-4 visaholders who are exempt from federal and state income taxes on their international-organization salaries under international agreements to which the United States is a party, undermines and interferes with an objective of those agreements by penalizing these visaholders domiciled in Maryland on account of that income tax exemption.

3. *Due Process.* Respondents also challenged the University's policy on the ground that it created an irrebuttable presumption of nondomicile that denied G-4 visaholders due process of law under the principles of *Vlandis* v. *Kline*, *supra*. In *Elkins* v. *Moreno*, *supra*, this Court held that that contention was squarely governed by *Vlandis;* and its decision in *Toll* v. *Moreno*, *supra*, which remanded the case for consideration of the intervening Clarifying Resolution, did not decide to the contrary. On remand, the lower courts correctly held that until the Clarifying Resolution of June 23, 1978, the University's paramount concern in awarding in-state status was with domicile under state law and that thus, until that time, the validity of its policy for due process purposes remained governed by *Vlandis*. Moreover, this Court should not reach out to overrule *Vlandis*, since that decision, as limited by *Weinberger* v. *Salfi*, 422 U.S. 749, 771-72 (1975), represents a principled and useful implementation of procedural due process.

4. *Eleventh Amendment.* The District Court stayed its original order of July 13, 1976, pending appeal on the basis of the University's representations that, if the appeal was not successful, it would make the respondent class whole back through that date. In its latest order, the District Court reaffirmed its original order and ordered the University, as an implementation of the conditions of the initial stay, to make refunds of the differ-

ence between out-of-state and in-state tuition and charges to any member of the respondent class who could show Maryland domicile for the period from July 13, 1976, to date. The University's claim that this refund order violates the Eleventh Amendment was properly rejected by both courts below on the ground that the University waived its Eleventh Amendment immunity in obtaining the original stay.

ARGUMENT

I. THE UNIVERSITY'S IN-STATE POLICY DISCRIMINATES AGAINST A CLASS OF NONIMMIGRANT ALIENS DOMICILED IN MARYLAND, IN VIOLATION OF THE EQUAL PROTECTION CLAUSE.

We address first the lower courts' holding that the University's In-State Policy, which denies G-4 visaholders the opportunity to obtain in-state status, violates the Equal Protection Clause. That holding applies to the University's policy both before and after the Clarifying Resolution of June 23, 1978.

A. The University's Policy Creates a Classification Based on Alienage and, as Such, Is Subject to Strict Judicial Scrutiny.

It is well established that state classifications based on alienage are inherently suspect and are "subject to strict scrutiny whether or not a fundamental right is impaired." *Graham* v. *Richardson*, 403 U.S. 365, 376 (1971). See also *Sugarman* v. *Dougall*, 413 U.S. 634, 642 (1973); *In re Griffiths*, 413 U.S. 717, 721 (1973); *Examining Board* v. *Flores de Otero*, 426 U.S. 572, 601-02 (1976); *Nyquist* v. *Mauclet*, *supra*, 432 U.S. at 7. Under this principle, such classifications can be justified only if the State can show that its purpose or interest is substantial and that "its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest" (*In re Griffiths*, *supra*, at 721-22) and is "precisely drawn in light of

the acknowledged purpose" (*Sugarman* v. *Dougall*, *supra*, at 643).

In *Nyquist* v. *Mauclet*, this Court not only reaffirmed these principles, but made clear that they apply even when the state enactment discriminates only against a certain sub-class of aliens rather than against all aliens. That case involved a provision of a New York statute that barred state financial assistance for higher education to aliens who had neither applied for U.S. citizenship nor submitted a statement of intent to do so. New York contended that the statute "should not be subjected to . . . strict scrutiny because it does not impose a classification based on alienage," but distinguishes "only within the 'heterogeneous' class of aliens" and "does not distingunish between citizens and aliens *vel non*." 432 U.S. at 7-8. The Court rejected that argument, pointing out that the statute "is directed at aliens and that only aliens are harmed by it," and "[t]he fact that the statute is not an absolute bar [against aliens generally] does not mean that it does not discriminate against the class." *Id.* at 9. Likewise, the state statute struck down in *Graham* v. *Richardson*, *supra*, had not prohibited *all* aliens from obtaining welfare benefits, but only those who did not meet a 15-year durational residency requirement. Cf. *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 169, 172 (1972); *Mathews* v. *Lucas*, 427 U.S. 495, 504-05 n.11 (1976).

As the courts below recognized, the University's In-State Policy falls directly within the principles of those decisions. That policy on its face treats a sub-class of aliens—G-4 and other nonimmigrant aliens—differently from citizens and immigrant aliens. Under it, citizens and immigrant aliens are granted in-state status if they (or those upon whom they are dependent) can show domicile in Maryland. Nonimmigrant aliens, however, are universally barred from obtaining in-state status, even though in fact some categories of nonimmigrants—namely, G-4 and similar visaholders—can be domiciled in Maryland under federal and state law.

Since the University, in attempting to justify this discrimination, refers repeatedly to the denial of in-state benefits to nonimmigrant aliens *in general*, it is important to emphasize that the effect of the discrimination worked by the policy falls only on nonimmigrant aliens *who are lawfully domiciled in Maryland*. Respondents have never contended that the University's policy of denying in-state benefits to nonimmigrant aliens is unconstitutional as applied to nonimmigrant visaholders who are unable as a matter of federal or state law to establish domicile in the State. Such nonimmigrants are in no way harmed by the University's policy, because even if they were accorded equal treatment with citizens and immigrant aliens—*i.e.*, subject to a test of domicile—they would fail to qualify for in-state status. Rather, the disadvantaged class consists of the G-4 and few other categories of nonimmigrant visaholders who, under the principles of this Court's decision in *Elkins* and the Maryland Court of Appeals' decision in *Toll*, are capable of establishing domicile in Maryland (see pp. 4-5, *supra*) and who are so domiciled. They, unlike most nonimmigrants, could enjoy the benefits of in-state status if they were treated on an equal basis with other Maryland domiciliaries who happen to be U.S. citizens or immigrant visaholders.

Thus, the classification established by the University's policy is between two kinds of Maryland domiciliaries: citizens and immigrant aliens who are domiciled in Maryland are allowed to obtain in-state status; G-4 and similar nonimmigrant aliens *who are likewise so domiciled under state law* are not. The latter are the *only* Maryland domiciliaries precluded from proving domicile and thus obtaining in-state status.[7] The policy thus draws

[7] The University claims that some citizens are also excluded from in-state status without reference to domicile, and gives the example of members of the Armed Forces assigned by the military to attend the University for educational purposes (Pet. Br. 5). A review of the University's In-State Policy shows that claim to be erroneous. The In-State Policy provides that citizens will be entitled to in-state

a line based solely on alienage. As in *Nyquist*, even though this classification does not harm *all* aliens, it is directed at a sub-class of aliens and disadvantages *only* aliens. Hence, the classification is one based on alienage to which strict scrutiny applies under the principles of this Court's decisions.

The University argues, however, that the strict-scrutiny standard was erroneously applied by the courts below, and should not be applied by this Court, because the individuals discriminated against hold nonimmigrant rather than permanent resident visas. It contends that this Court should hold that, while discrimination against all aliens or against immigrant aliens is subject to strict judicial scrutiny, the present discrimination against non-immigrant aliens should not be judged by that standard, but by the more lenient "rational basis" test. However, none of the reasons advanced by the University in sup-

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status in a number of listed cases. One is where the student is dependent upon a parent or spouse domiciled in Maryland for six months; another is where a financially independent student has been domiciled in Maryland for six months; still another is where an Armed Forces student has been stationed on active duty in Maryland for six months unless he has been assigned to the University for educational purposes (P.A. 168a). Thus, although an Armed Forces student assigned to the University for educational purposes could not qualify for in-state status by virtue of the special provision for Armed Forces members, *he could still qualify by showing that he has been domiciled in Maryland for six months.*

The University also states that its policy excludes students who are financially dependent on parents or spouses not domiciled in the State (Pet. Br. 5). That is true but irrelevant. Domicile is still the test for financially dependent citizen or immigrant students; it is simply the domicile of their parents or spouses that is relevant. (Indeed, the references in this brief to "Maryland domiciliaries" are intended to cover those whose status at the University is, or would be, determined by a Maryland domiciliary, whether financially independent students domiciled in Maryland or students dependent on a Maryland domiciliary.) *The only individuals who are excluded from in-state status regardless of the domicile of either the students themselves or of the parents or spouses upon whom they are dependent are a class of aliens.*

port of its position provides any justification for a holding that the strict-scrutiny standard is inappropriate to judge the University's alienage-based classification in the present case.

1. The first reason advanced by the University to show why strict scrutiny is not appropriate here is that all prior cases in which this Court has applied that standard have involved a statute or practice that discriminated against permanent resident aliens. The University then claims that this Court's opinions in those cases suggest that its decisions to apply strict scrutiny were limited to discrimination against immigrant aliens (Pet. Br. 19-22). That contention is erroneous.

It is true that the above-cited cases applying strict scrutiny involved either all aliens or permanent resident aliens. But that simply reflects the fact that the enactments in those cases had no practical effect on the great majority of nonimmigrant aliens and were not being challenged by nonimmigrants. See, *e.g.*, *Nyquist* v. *Mauclet*, *supra*, 432 U.S. at 4 ("Since many aliens, such as those here on student visas, may be precluded by federal law from establishing a permanent residence in this country . . . the bar of [the challenged statute] is of practical significance only to resident aliens").[8] This Court has never suggested in any of its cases that different modes of analysis apply to state classifications based on alienage depending upon the visa status of the aliens discriminated against.

While there may be support for affording less protection to true nonresident aliens, in the sense of aliens living outside the United States,[9] the reasons for strict

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[8] Similarly, since most nonimmigrant visaholders (unlike G-4 and similar nonimmigrant aliens) are present in this country on only a temporary basis for limited purposes, they would not ordinarily be in a position to apply for a license to practice law (*In re Griffiths*, *supra*), for state civil service employment (*Sugarman* v. *Dougall*, *supra*), or for welfare benefits (*Graham* v. *Richardson*, *supra*).

[9] See cases cited by the District Court in footnote 8 of its April 17, 1980 opinion (P.A. 36a).

scrutiny apply equally to aliens lawfully residing within the United States regardless of their visa status. The principle underlying strict scrutiny for certain classifications is that the class discriminated against is a "discrete and insular" minority (*United States* v. *Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938)) that has been "subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process" (*San Antonio Indep. School District* v. *Rodriguez*, 411 U.S. 1, 28 (1973)). Thus, the reason that this Court has found state classifications based on alienage to be suspect and subject to strict scrutiny is its recognition that aliens are politically powerless, since they cannot vote and hence "have no direct voice in the political processes" (*Foley* v. *Connelie*, 435 U.S. 291, 294 (1978)), and have often suffered from prejudice and purposeful discrimination by the majority. As this Court stated in *Graham* v. *Richardson*, *supra*, 403 U.S. at 372, aliens "are a prime example of a 'discrete and insular' minority [citation omitted] for whom such heightened judicial solicitude is appropriate." As the District Court noted, "[t]his treatment is seemingly premised on the aliens' minority status in the community, not their potential citizen status" (P.A. 38a). See also J.H. Ely, *Democracy and Distrust*, 161-62 (1980). Moreover, this Court has made clear that even a sub-class of aliens is entitled to this protection so long as the enactment discriminating against them is directed at aliens and harms only aliens (as does the University's classification at issue here). *Nyquist* v. *Mauclet*, *supra*, 432 U.S. at 9. This analysis is not limited to immigrant aliens. In fact, nonimmigrant aliens are at least as "discrete and insular" a minority in need of "heightened judicial solicitude" as are other aliens.

To be sure, as the University notes (Pet. Br. 20), this Court has in some of its opinions referred to certain typical attributes of permanent resident aliens (*e.g.*,

payment of all taxes). But those references were generally made in the context of determining whether the enactments in question could survive strict scrutiny, not whether strict scrutiny applied. *Graham* v. *Richardson*, *supra*, 403 U.S. at 376; *Nyquist* v. *Mauclet*, *supra*, 432 U.S. at 12. See also *Sugarman* v. *Dougall*, *supra*, 413 U.S. at 645. The Court has never suggested that nonpayment of or exemption from certain taxes, or any of the other attributes of certain nonimmigrant aliens, is a sufficient reason to lower the equal protection standard applicable to state action discriminating against them.[10] The important fact is that where, as here, the State has drawn a line based on alienage, that classification is suspect and must be subject to particularly searching judicial inquiry.

At the least, the strict-scrutiny standard is appropriate to judge the validity of a state enactment discriminating against nonimmigrant aliens where, as in the case of the University's policy, the discrimination falls only on those nonimmigrants, such as G-4's, who are similarly situated to citizens and immigrant aliens with respect to the establishment of domicile in this country and in the State. To the extent that the Court's references in prior opinions to the contributions of resident aliens may be relevant to the standard of review, it is significant that G-4 visaholders may reside in the State for many years, must obey state laws, contribute to the economic growth of the State through payment of all taxes except taxes on their salaries from the international organizations, and may, as in *Nyquist*, "play a

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[10] The decision in *United States* v. *Tsuda Maru*, 479 F. Supp. 519 (D. Alas. 1979), cited by the University (Pet. Br. 21), is inapposite here. That case involved a Japanese fishing boat that came within the off-shore waters (within 200 miles) over which the United States claimed certain jurisdiction—not an alien admitted to the United States, and certainly not one who could be domiciled here. More important, that case involved a *federal* statute, and, as shown below (p. 21), Congress has broad powers, that the States do not possess, to impose restrictions on aliens.

role—perhaps even a leadership role—in other [*i.e.*, non-political] areas of import to the community" (432 U.S. at 12). See also p. 24, *infra*. If such individuals are domiciled in the State under the State's own law, they should be entitled to the same protection as immigrant aliens so domiciled.[11] The fact that they are exempt from taxes on their international-organization salaries should not change this result. As noted above, that exemption is established by treaties or international agreements or by virtue of federal and state statute, and is not waivable by the individual G-4 employees. See p. 2, *supra*.[12] When the aliens in question are domiciled in the State and may make significant contributions to the

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[11] It is no answer to say that the G-4 visaholders in question could avoid the discrimination against them by simply adjusting their status to immigrant. First of all, as a factual matter, the G-4 visaholders employed by the international organizations employing respondents' fathers could not voluntarily adjust their status to immigrant while working for those organizations. Such an adjustment requires a certification from the Secretary of Labor that there are not sufficient qualified and available workers for the job in the United States (8 U.S.C. § 1182(a)(14)); and this requires the alien's employer to file job offer forms certifying that they have looked for and cannot find U.S. citizens who are equally qualified (20 C.F.R. § 656.21). Since the international banks employing respondents' fathers are required, under the international agreements establishing them, to pay "due regard to the importance of recruiting the staff on as wide a geographical basis as possible" (Agreement Establishing the Inter-American Development Bank (cited in Addendum A), art. VIII, § 5(e); Articles of Agreement of the International Bank for Reconstruction and Development (cited in Addendum A), art. V, § 5(d)), they are precluded from making the search for U.S. citizens that is necessary to make the required certification. (See also J.A. 20A, 24A-25A.) In any event, this Court made clear in *Nyquist* that the aliens' ability to adjust their status voluntarily does not change the appropriateness of strict scrutiny for a classification discriminating against such aliens. 432 U.S. at 9 n.11.

[12] In fact, immigrant visaholders working for the same international organizations as the respondents' fathers are likewise exempt from taxes on their bank salaries under the international agreements establishing the organizations. See p. 2, n.2, *supra*.

State, that partial income tax exemption (over which they have no control) is clearly an insufficient reason to lower the standard of protection they receive under the Equal Protection Clause.[13] In short, at least where, as here, state action discriminates against such nonimmigrant aliens domiciled in the State by treating them more harshly than citizens or immigrant aliens so domiciled, that classification is appropriately subject to strict scrutiny.[14]

2. The second argument advanced by the University for why strict scrutiny should not apply is that, since many aliens are eligible for in-state benefits, "it is irrational to contend that the in-state policy denies its benefits on the basis of alienage" (Pet. Br. 22). In *Nyquist* the appellants similarly contended that the statute in question distinguished "only within the 'heterogeneous' class of aliens" and not "between citizens and aliens *vel non*." 432 U.S. at 8. As noted above, this Court expressly rejected that argument, stating that "[t]he important points are that [the statute] is directed at aliens

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[13] We discuss below whether that tax exemption is sufficient to justify the University's discrimination at issue here under whatever equal protection standard applies. See pp. 24-25, *infra*.

[14] It is for this reason that the arguments of Professor Rosberg, so heavily relied on by the University, do not support its contention. Rosberg makes clear that his thesis is premised on the fact that nonimmigrants "cannot have an intention of remaining here indefinitely . . . ." G. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, S. Ct. Rev. 275, 312 (1977). That article was written prior to, and does not take account of, this Court's holding in *Elkins* that G-4 and a few similar categories of nonimmigrant visaholders *can* have the intention of remaining in the United States indefinitely. When *these* nonimmigrants are treated differently from citizens and immigrants, despite their similar ability to be domiciled in the United States, Rosberg would presumably agree that the classification is one based on alienage rather than nonresidence. We note that, in a portion of his article not quoted by the University, Rosberg cites the District Court's initial decision in this case with approval. *Id.* at 313 n.143.

and that only aliens are harmed by it. The fact that the statute is not an absolute bar [against all aliens] does not mean that it does not discriminate against the class." 432 U.S. at 9. Here, as in *Nyquist*, although not all aliens are barred from in-state benefits by the University's policy, the policy is directed at a class of aliens and only aliens are harmed by it. Hence, strict scrutiny is the applicable standard.

3. The University's third argument is that strict scrutiny should not apply because "in-state tuition and fees are not 'necessities of life'" (Pet. Br. 22). Again, this argument was raised in *Nyquist*: "Appellants also seem to assert that strict scrutiny should not be applied because aid to education does not deny an alien 'access to the necessities of life.'" 432 U.S. at 8 n.9. This Court rejected that contention, noting first that the statement of purpose in the statute itself referred to higher education as a "necessity," and stating further that

> "in any event, the Court noted in *Graham* v. *Richardson* . . . that classifications based on alienage 'are inherently suspect and are therefore subject to strict scrutiny *whether or not a fundamental right is impaired.*" *Id.* (emphasis added).

The University seeks to avoid this result by citing the Chief Justice's statement for the Court in *Foley* v. *Connelie*, *supra*, 435 U.S. at 295, that the exclusions in prior cases applying strict scrutiny, including *Nyquist*, "struck at the non-citizen's ability to exist in the community." The University then claims that only a "dollar differential, not a right to education, is at stake here" (Pet. Br. 23). In fact, however, as the Court recognized in *Foley* (435 U.S. at 295 n.4), the "necessity" referred to in *Nyquist* was the necessity of higher education itself, not of the aid to education involved. The actual benefits involved in *Nyquist*—namely, loans, tuition assistance, and scholarships in aid of higher education—are analytically indistinguishable from the financial benefits of lower tuition and fee rates at the

University of Maryland.[15] Moreover, the benefits of in-state status at the University of Maryland are not limited to a "dollar differential," but also encompass more lenient admission standards, which can be crucial to the students' ability to enter the University at all. In any event, as this Court recognized in *Nyquist*, classifications based on alienage are subject to strict scrutiny regardless of the nature of the underlying right or benefit in question.[16]

4. Fourth, the University asserts, without citation of precedent, that strict scrutiny should not apply here because its policy is "consistent with the purposes of federal immigration law," since "the Federal Government has no policy in favor of according educational benefits to nonimmigrants—in fact, just the opposite" (Pet. Br. 23, 24). First, this argument is really more of an attempted justification for the policy than a basis

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[15] The University claims that this case is different from *Nyquist* because denial of the scholarship assistance there could have denied the aliens in question a higher education (Pet. Br. 23 n.16). First of all, that is not necessarily true. Indeed, one of the forms of aid involved in that case was awarded without regard to need. See 432 U.S. at 2. In any case, the denial of in-state status here could have the same effect as the denial of benefits in *Nyquist*. Contrary to the University's suggestion (Pet. Br. 23), not all G-4 visaholders are professional employees; they also include clerical personnel and others, for whom the tuition differential could make a significant difference. Moreover, as noted in the text, in-state status also includes preference for admission, which can be critical to the students' ability to enter the University regardless of their financial standing.

[16] The Court in *Foley* recognized an exception to this rule where aliens are excluded from a "governmental function" involving "discretionary decision-making, or execution of policy, which substantially affects members of the political community." 435 U.S. at 296. See also *Ambach* v. *Norwick*, 441 U.S. 68 (1979). Obviously, no such "governmental function" is involved in the University's In-State Policy at issue here. Both *Foley* and *Ambach* preserved the continuing viability of *Nyquist* where aliens are denied access to state educational benefits. See 435 U.S. at 295; 441 U.S. at 73.

for determining what standard of scrutiny should apply to a state enactment. In any case, the simple answer to this contention is that, as this Court has made clear, "Congress, as an aspect of its broad power over immigration and naturalization, enjoys rights to distinguish among aliens that are not shared by the States." *Nyquist* v. *Mauclet*, *supra*, 432 U.S. at 7 n.8. See also *Mathews* v. *Diaz*, 426 U.S. 67, 79-87 (1976); *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 100-01 (1976). Thus, the fact that Congress or an appropriate federal administrative agency may have drawn certain lines respecting aliens in the distribution of benefits implies nothing about a State's power to act in a similar fashion.[17] Indeed, the Court in *Nyquist* made clear that it is not even permissible for a State to attempt to justify a policy on the basis of concerns relating to immigration or naturalization. 432 U.S. at 10.

For these reasons, the University has failed to offer a single persuasive argument in favor of reversing the holding of the courts below that the alienage-based classification created by the University's In-State Policy—*i.e.*, its treatment of nonimmigrant aliens domiciled in the State differently from citizens and immigrants domiciled in the State—is subject to the test of strict judicial scrutiny.

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[17] As a matter of fact, the University is in error in asserting that 42 U.S.C. § 1395o—the statute upheld in *Mathews* v. *Diaz*—drew a line "between nonimmigrants on one hand and citizens and permanent resident aliens on the other" (Pet. Br. 24). That statute conditions Medicare eligibility for aliens on both immigrant visa status *and* actual residence in this country for five continuous years immediately preceding application for benefits. Thus, it operates to deny benefits not only to nonimmigrant aliens but also to some immigrant aliens—*i.e*, those who fail to meet the durational residency requirement. Conversely, 45 C.F.R. § 177.201, also cited by the University (Pet. Br. 24), does not exclude all nonimmigrant aliens from eligibility for the low-interest student loans involved; it grants such eligibility to nonimmigrants who are in this country for other than a temporary purpose and who can show evidence of intent to become a permanent resident.

B. The Classification Created by the University's Policy Cannot Be Justified by the Interests Asserted To Support It.

In its initial appeal to the Fourth Circuit, the University expressly conceded that its In-State Policy "will not withstand a 'strict scrutiny' Equal Protection standard" (see P.A. 41a n.14). It evidently continues to concede that point since it makes no effort in its current brief to justify its policy under the strict-scrutiny standard of review and indeed states that it "has advanced only 'rational bases' for the exclusion of nonimmigrants from in-state benefits" (Pet. Br. 19). That concession is clearly correct. As noted above, under the strict-scrutiny standard, the State must show not only that its interest is substantial, but that the classification is necessary to the effectuation of that interest and is precisely drawn and precisely tailored to serve that interest. *E.g.*, *Examining Board* v. *Flores de Otero*, *supra*, 426 U.S. at 602, 605; *Sugarman* v. *Dougall*, *supra*, 413 U.S. at 643; *San Antonio Indep. School District* v. *Rodriguez*, *supra*, 411 U.S. at 17. Our discussion below of the interests asserted by the University to support its policy makes clear that those interests cannot justify its treatment of G-4 and similar visaholders domiciled in Maryland under that exacting test. See pp. 23-27, *infra*.

In any event, even if this Court should hold, contrary to our argument, that the classification created by the University's policy is not subject to strict scrutiny, we submit that the interests asserted by the University are still insufficient to justify that classification under the "rational basis" test or whatever other standard of scrutiny the Court should decide to apply.[18] It must be reiterated that, despite the University's various repeated statements pertaining to the class of nonimmigrants generally, the discrimination worked by its policy falls only

[18] We note that the Supremacy Clause may require a strict scrutiny of the University's policy even if the Equal Protection Clause standing alone would not. See pp. 29-30, *infra*.

on the G-4 and similar visaholders who can be domiciled in Maryland. Thus, the affected class with reference to which the policy must be judged is not the nonimmigrant aliens who cannot be domiciled in Maryland—and who would thus fail to qualify for in-state benefits even if treated the same as citizens and immigrant visaholders—but rather the G-4 and similar nonimmigrant visaholders who would be capable of qualifying for in-state benefits if treated on an equal basis with citizens and immigrants. The exclusion of these visaholders from in-state benefits even if they could show domicile in Maryland cannot be justified under any equal protection analysis.

The first two interests asserted by the University to justify its policy are (1) limiting its expenditures by providing a subsidy to those more likely to contribute to the economic well-being of the State and the University, and (2) equalizing the cost of higher education between those who pay state income taxes and those who do not (Pet. Br. 26). Both of these interests are based on the assertion that nonimmigrant aliens do not pay the full range of state income taxes (see Pet. Br. 26-30).

First of all, the University's assertions regarding the lack of contribution of many categories of nonimmigrants—*e.g.*, temporary visitors and student (F) visaholders—are irrelevant, since, under *Elkins*, such visaholders are precluded by federal law from being domiciled in the United States and thus could not qualify for in-state status at the University in any event. See p. 4, *supra*. Of those in categories that can be domiciled in the State, some *are* subject to the full range of income taxes if they reside in the State—*e.g.*, treaty traders and investors (E visaholders) and foreign media representatives (I visaholders)[19]—contrary to the University's claim (Pet. Br. 27). Of course, G-4

[19] See, *e.g.*, Treas. Reg. § 1-871-1(a); Rev. Rul. 64-285, 1964-2 C.B. 184. Unlike G-4's, these visaholders do not have a general income tax exemption on their salaries under treaty or law.

visaholders, the class involved in this case, are exempt from income taxes on their salaries from the international organizations employing them, and it must therefore be that exemption that forms the basis for the University's attempt to justify their exclusion from in-state status even if domiciled in the State.

That exemption, however, is insufficient to justify the discrimination against these aliens, since, despite the existence of the exemption, the University's classification is not adequately related to its asserted interests. Although G-4 visaholders are exempt from federal and state income taxation on their official salaries by treaties or international agreements or by federal and state statutes (an exemption they cannot waive), they are subject to all other taxes, including real estate and sales taxes, as well as federal, state, and local income taxes on any income received by them other than the salaries paid them by the international organizations. For example, if their spouses work in this country, as they are specifically permitted to do, they must pay all income taxes on their compensation. See 8 C.F.R. § 214.2(g)(2). Thus, over a course of years, G-4 visaholders and their families domiciled in Maryland may have contributed far more to the State than a financially independent citizen student who has maintained a domicile in the State for the minimum six-month period required for in-state benefits. Indeed, this fact led the District Court in its initial decision to reject the University's asserted interest in cost equalization (P.A. 88a).

Moreover, the University makes no effort to classify citizens and immigrant aliens domiciled in Maryland on the basis of their tax liability or payments. It allows such a citizen or immigrant domiciled in the State to obtain in-state status regardless of whether—and the extent to which—he pays state income taxes and regardless of whether he has contributed little, if anything, to the State's income tax revenues. For example, citizens who derive all or a significant portion of their income from any one of a number of sources exempt from Mary-

land income tax[20] are nonetheless entitled to in-state status upon a showing of Maryland domicile. Furthermore, *immigrant* visaholders employed by public international organizations such as those employing the respondents' fathers are likewise exempt from federal and state income taxes on their salaries under the international agreements establishing those organizations. See p. 2, n.2, *supra*.[21] Yet, as this Court recognized in *Elkins*, the University has admitted that they could still obtain in-state status for their dependents upon a showing of domicile in Maryland. See 435 U.S. at 656-57 n.5 (P.A. 112a-113a n.5).

It is thus obvious that the University's classification at issue here is not drawn with enough precision, in terms of its interests in limitation of expenditures and cost equalization, to withstand the test of strict scrutiny. We further submit that that classification between citizens and immigrants domiciled in Maryland and G-4 and similar nonimmigrants likewise so domiciled is sufficiently

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[20] There are numerous such tax-exempt sources, some of which arise because Maryland law adopts the federal exclusions from adjusted gross income (Md. Ann. Code, art. 81, § 280(a)) and some of which arise from Maryland's own exclusions. These sources include, *inter alia*: social security and railroad retirement benefits (Treas. Reg. § 1.61-11(b)); workman's compensation (26 U.S.C. § 104(a)); life insurance benefits (26 U.S.C. § 101(a)(1)); federal, state, or local welfare payments (Rev. Rul. 57-102, 1957-1 C.B. 26); disability payments (within limits) under public or private retirement plans (26 U.S.C. § 105(d); Md. Ann. Code, art. 81, § 280(c)(10) (1981 Supp.)) or under police and fireman pension systems (*id.* § 280(c)(2)); payments (up to social security equivalent) under federal, state, or municipal retirement systems (*id.* § 280(c)(3)); and income from Maryland state or municipal bonds (26 U.S.C. § 103; Md. Ann. Code, art. 81, § 280(b)(1)).

[21] As noted there, immigrants employed by an international organization whose employees' tax exemption is established only by statute must waive the exemption or otherwise have their status adjusted to G-4; but where, as here, the organizations' income tax exemption is established by treaty or international agreement, that waiver requirement does not apply and immigrant employees are also entitled to the exemption. See Treas. Reg. § 1.893-1(c)(2).

arbitrary and irrational, in terms of those asserted interests, that it cannot be justified even under a less stringent equal protection standard.

The third justification asserted by the University to support its policy is its interest in administrative convenience and efficiency, particularly in avoiding "the administrative difficulties presented by individualized hearings for the University's large nonimmigrant student population" (Pet. Br. 30 n.24). That interest is clearly insufficient to justify the policy under the strict-scrutiny test. *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250, 267 (1974); *Shapiro* v. *Thompson*, 394 U.S. 618, 633-38 (1969). It is further insufficient in the present case to justify the policy even under a less strict test. See, *e.g.*, *Reed* v. *Reed*, 404 U.S. 71, 76-77 (1971). The University's argument is based on the assumption that, in the absence of the exclusion of all nonimmigrant aliens, it would face a great administrative burden. That premise is erroneous since most nonimmigrant students, including student (F) visaholders, are incapable as a matter of federal law of establishing domicile in the United States, and hence most of the University's "large nonimmigrant student population" need not be given individualized hearings on their domicile. See p. 4, *supra*. Such hearings would be required only for the G-4 and similar visaholders who can be domiciled in Maryland and who request the opportunity to show Maryland domicile. The University already has in place an administrative procedure for determining eligibility for in-state status on a case-by-case basis, and it uses that procedure to inquire into the domicile of citizens and immigrant aliens (P.A. 169a-170a). The University could easily use that existing procedure to consider domicile for the G-4 and similar nonimmigrants who wish to show Maryland domicile. There are relatively few nonimmigrant students who are capable of being domiciled in Maryland,[22] and providing

[22] For example, the record shows that there were only 68 G-4 visaholders registered at the University in the fall of 1978 and 72 in the fall of 1979 (J.A. 52A-53A). See also n.6, pp. 6-7, *supra*.

hearings for these students (even assuming that they all claimed Maryland domicile, which is unlikely) would hardly be a great administrative burden compared to the total requests for classification to in-state status.[23]

For these reasons, the interests asserted by the University to support the classification made by its In-State Policy cannot justify that classification either under a strict-scrutiny test or even under a less stringent equal protection analysis.

II. THE UNIVERSITY'S IN-STATE POLICY VIOLATES THE SUPREMACY CLAUSE OF THE CONSTITUTION.

The University's policy at issue here (both before and after the Clarifying Resolution of June 23, 1978) violates the Supremacy Clause for two reasons: (1) it impermissibly encroaches upon the exclusive federal authority over immigration; and (2) it interferes and conflicts with an objective of international agreements to which the United States is a party.

A. The University's Policy Constitutes an Impermissible State Intrusion into the Field of Immigration.

Under the Supremacy Clause, States may not encroach upon the exclusive federal power over, and policies involving, immigration and naturalization under federal law. *Graham* v. *Richardson, supra*, 403 U.S. at 376-80. While not every state enactment that deals with aliens is a regulation of immigration that is preempted, this Court's decisions have established certain principles governing when such a state enactment does become im-

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[23] The University also claims that, assuming that the disadvantaged class consists only of those nonimmigrants who can be domiciled in Maryland, a fourth interest supports its policy—"the prevention of disparate and unequal treatment between classes of nonimmigrants" (Pet. Br. 26 n.19). That interest must clearly fail, since the nonimmigrants harmed by the policy are in fact differently situated, with respect to domicile, from most nonimmigrant aliens, as this Court held in *Elkins*.

permissible under the Supremacy Clause. Thus, in *Takahashi* v. *Fish & Game Commission*, 334 U.S. 410, 419 (1948), this Court explained:

> "The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization. [Citation omitted.] Under the Constitution the states are granted no such powers; they can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization *and residence* of aliens in the United States or the several states. *State laws which impose discriminatory burdens upon the* entrance or *residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration*, and have accordingly been held invalid." (Emphasis added.)

The Court further noted that all persons lawfully in the country have the right to abide in any State "on an equality of legal privileges with all citizens under nondiscriminatory laws." *Id.* at 420. Similarly, in *Graham* v. *Richardson*, *supra*, 403 U.S. at 378, 379, this Court indicated that where a state statute imposed "auxiliary burdens" not contemplated by Congress "upon the entrance or *residence* of aliens" lawfully within the United States, it was in conflict with the "overriding national policies in an area constitutionally entrusted to the Federal Government" (emphasis added). Again, in *DeCanas* v. *Bica*, 424 U.S. 351, 358 n.6 (1976), this Court stated that "state regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress." See also *Hines* v. *Davidowitz*, 312 U.S. 52, 66-67 (1941); *C.D.R. Enterprises, Ltd.* v. *Board of Education*, 412 F. Supp. 1164, 1171-72 (E.D.N.Y. 1976), *aff'd sub nom. Lefkowitz* v. *C.D.R. Enterprises, Ltd.*, 429 U.S. 1031 (1977).

In *Examining Board* v. *Flores de Otero*, *supra*, 426 U.S. at 602, the Court discussed the relationship between these principles and those under the Equal Protection Clause:

> "The underpinnings of the Court's constitutional decisions defining the circumstances under which state and local governments may favor citizens of this country by denying lawfully admitted aliens equal rights and opportunities have been two. The first [is] based squarely on the concepts embodied in the Equal Protection Clause of the Fourteenth Amendment . . . . *The second, grounded in the Supremacy Clause*, Const., Art. VI, cl. 2, and in the naturalization power, Art. I, § 8, cl. 4, *recognizes the Federal Government's primary responsibility in the field of immigration and naturalization.*" (Emphasis added.)

The Court then went on, without distinguishing between these two bases, to hold that, while the States have some discretion in adopting enactments restricting benefits to aliens, "[i]n each case, the governmental interest claimed to justify the discrimination is to be carefully examined in order to determine whether that interest is legitimate and substantial, and inquiry must be made whether the means adopted to achieve the goal are necessary and precisely drawn." *Id.* at 605.

Following this analysis, the District Court here noted that that standard "is essentially the strict-scrutiny analysis previously discussed in reference to the Equal Protection arguments"; and it held that since the University had failed to meet that standard in attempting to justify the discriminatory treatment of a class of aliens under its policy, that policy violated the Supremacy Clause as well as the Equal Protection Clause (P.A. 47a). This analysis is certainly warranted in view of this Court's decision in *Flores de Otero*. Contrary to the University's claim (Pet. Br. 32-33), it would not "automatically invalidat[e] on supremacy clause grounds every asserted discrimination against an alien subclass," but rather only those that do not meet the standard

enuciated in *Flores de Otero*. Moreover, that standard would apparently apply under the Supremacy Clause whether or not it applies for equal protection purposes.

The District Court's analysis, however, is not the only way to look at the question. We submit that, under the above-cited principles of this Court's decisions in *Takahashi*, *Graham*, and *DeCanas*, the University's policy should be held to be invalid under the Supremacy Clause —and the judgment of the courts below thus upheld— apart from any reliance on equal protection analysis.

What such decisions establish is that it is up to the Federal Government to decide the terms and conditions on which aliens will be admitted to this country and on which they reside in this country, and that once it has made that decision with respect to a particular class of aliens, the States may not impose additional discriminatory burdens on their residence in this country. Again, this does not mean that all state-imposed restrictions on aliens are impermissible. In some cases, for instance, the State may rely on *federal* law for purposes of making certain distinctions among aliens. Thus, for example, in the case of aliens who have not been lawfully admitted to the United States under federal law, the State would not necessarily violate the Supremacy Clause by *using* that federal-law decision to impose certain restrictions on those illegal aliens. See *DeCanas* v. *Bica*, *supra*. Similarly, in the case of lawfully admitted nonimmigrant aliens who are precluded by the terms of their visas under federal law from establishing a domicile in this country (*e.g.*, students holding F visas), a state university that bases in-state status on domicile would not violate the Supremacy Clause by relying on that federal law to adopt a general rule that such aliens could not obtain in-state status.

But where certain nonimmigrant aliens have been lawfully admitted to the United States and the terms of their visas permit them to establish domicile in this country, then the State ordinarily may not, on account of their

immigration status, deny them the benefits that it grants to all other domiciliaries of the State. Such action would appear to be justified only in exceptional circumstances, where the State is regulating in an area that is traditionally bound up with its operation as a sovereign political and governmental entity (such as defining the qualifications for voting or for serving as an official charged with formulating or executing public policy). See, *e.g.*, *Skafte* v. *Rorex*, 553 P.2d 830 (Colo. 1976), *appeal dismissed for want of subst. fed. ques.*, 430 U.S. 961 (1977) (upholding a ban on voting by aliens in school elections).[24] In the absence of such circumstances, the State may not subject such lawfully admitted aliens who can be and are domiciled in the State under federal and state law to restrictions that are not imposed on other state domiciliaries. To do so, as the University has done here, is

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[24] See also *Sugarman* v. *Dougall*, *supra*, 413 U.S. at 642-43, 647-49; *Nyquist* v. *Mauclet*, *supra*, 432 U.S. at 11; *Foley* v. *Connelie*, *supra*, 435 U.S. at 295-96; *Ambach* v. *Norwick*, *supra*, 441 U.S. at 75. Cf. *National League of Cities* v. *Usery*, 426 U.S. 833, 844-52 (1976).

Thus, the University can draw no support from its citation of *Ambach*, *Foley*, and *Skafte* for the proposition that this Court has on occasion "sustained far-reaching discrimination against aliens without a suggestion that the supremacy clause was implicated" (Pet. Br. 33). Although *Ambach* and *Foley* involved equal protection, not Supremacy Clause, challenges, this Court made clear in those cases that the Constitution recognizes that the concept of citizenship "is fundamental to the definition and government of a State" and that thus the States have wider latitude than normal in limiting the participation of noncitizens in the States' political and governmental functions. *Ambach*, 441 U.S. at 75. See also *Foley*, 435 U.S. at 295-96. The rationale of this exception would also appear to apply for Supremacy Clause purposes. Indeed, in *Skafte*, the court considered and rejected a Supremacy Clause argument, stating that "[v]oter qualification is a primary example of an area which the states have historically occupied," and that Congress did not and could not "remove from the states the exercise of this power . . . with respect to local elections." 553 P.2d at 834. Of course, the University's policy in this case does not involve such a restriction on participation in the State's basic political or governmental functions.

to impose on the residence of such aliens in the United States discriminatory burdens not contemplated by Congress in admitting them, and is accordingly inconsistent with the exclusive federal authority to regulate immigration.[25]

The University argues, however, that these preemption principles do not apply to state action which disadvantages only nonimmigrant aliens and which does not involve a "necessity of life" (Pet. Br. 32). But as in equal protection context, the principles of this Court's Supremacy Clause decisions are not so limited. Obviously, Congress's regulation of immigration applies to nonimmigrants as well as immigrants, and hence state action can be inconsistent with it. Similarly, the principles of this Court's holdings that the States may not subject lawfully admitted aliens to discriminatory burdens not contemplated by Congress are not limited to burdens that affect what the University calls "necessities of life." The important fact for present purposes is that Congress has decided that the nonimmigrants in question can be domiciled in the United States and yet the University is treating them more harshly than any other state domiciliaries.

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[25] The United States appears to agree with this analysis since it has made a very similar point in its brief to this Court in *Plyler* v. *Doe* and *In re Alien Children Education Litigation* (Nos. 80-1538 and 80-1934):

> "Similar problems [under the Supremacy Clause] would arise under a state statute that rendered ineligible for certain generally available state programs nonimmigrants who are lawfully present in the United States for a temporary period. Where a nonimmigrant alien child's visa permits him to assume a residency in a state of such a character or duration that he would be entitled under state law to a free public education but for his status under the federal immigration laws, the state's denial of a free education to the child ordinarily would be inconsistent with the congressional judgment to admit the child and therefore invalid under the Supremacy Clause. Cf. *Elkins* v. *Moreno*, 435 U.S. 647, 658, 663-669 (1978); *Toll* v. *Moreno*, 441 U.S. 458 (1979)."

The University also claims that its policy is "harmonious with the federal scheme," since a federal regulation of the Department of Education, 45 C.F.R. § 177.201, "presently denies [certain federal] educational benefits [namely, low-interest loans] to G-4's and other nonimmigrants" (Pet. Br. 32 & n.25). But the Federal Government has the prerogative of adopting such restrictions. The States do not have that right when such restrictions are inconsistent with the federal policy embodied in the Immigration and Nationality Act that certain lawfully admitted nonimmigrants can be domiciled in the United States and thus, by implication, that if they are so domiciled, they should not be subjected *by the States* to discriminatory burdens not imposed on other domiciliaries (at least where, as here, the State's fundamental political or governmental sovereignty is not implicated).

For these reasons, we submit that the University's policy of excluding nonimmigrant visaholders domiciled in Maryland from the benefits of in-state status encroaches on the exclusive federal power over immigration and thus violates the Supremacy Clause regardless of the outcome on the equal protection issue.

B. The University's Policy Interferes With Objectives of International Agreements to Which the United States Is a Party.

In addition to violating the Supremacy Clause on the above ground, we submit that the University's policy, as applied to G-4 visaholders (such as respondents' fathers) who are exempt from income taxes on their international-organization salaries by virtue of international agreements to which the United States is a party, violates that clause by interfering with an objective of those international agreements.[26]

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[26] The District Court rejected this contention (P.A. 45a), and the Court of Appeals did not address it. We assert this argument here as an alternative ground for affirmance of the judgment below as to the G-4 visaholders with treaty-based tax exemptions.

There is no requirement that there be an overt inconsistency between the language of state and federal enactments in order for the state enactment to be invalid under the Supremacy Clause. It is sufficient if the state enactment "burdens or conflicts in any manner with any federal laws or treaties" or "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress . . . .'" *DeCanas* v. *Bica*, *supra*, 424 U.S. at 357 n.5, 363 (quoting *Hines* v. *Davidowitz*, *supra*, 312 U.S. at 67). Such an obstacle is clearly present here. The international agreements establishing the organizations such as those employing respondents' fathers—agreements to which the United States is a party—preclude both the Federal Government and the States from levying income taxes on the salaries paid by the organizations to their non-U.S.-citizen employees. See Addendum A hereto. The Attorney General of the United States has issued an opinion indicating that this tax exemption is for the benefit of the international organizations and their member nations (including the United States),[27] that denial of that tax exemption would seriously embarrass the U.S. Government and could lead to retaliatory measures by other countries, and that thus the exemption is not subject to waiver by individual employees. 41 Op. Atty. Gen. 170, 172-73 (1954). Thus, the Federal Government has decided not only that the G-4 employees of these organizations can be domiciled in this country (as discussed above), but that they are to be exempt from federal and state income taxes on their official salaries.

The University's policy is inconsistent with that federal determination. The University subjects such G-4 employees domiciled in Maryland to restrictions not imposed

[27] This exemption—which applies equally to U.S. citizens employed by these organizations in other countries—benefits the organizations by, among other things, enabling them to pay salaries on a net-of-tax basis and by preventing any one country from benefiting through taxation from the required presence of the organizations' employees within its borders.

on other domiciliaries and attempts to justify that discrimination primarily on the basis that they are exempt from state income tax. Indeed, it emphasizes that the tuition differential at stake here is "an amount roughly equivalent to the amount of state income tax an international bank parent is spared by treaty each year" (Pet. Br. 23). Thus, the University's policy of refusing to allow these G-4 visaholders domiciled in Maryland to obtain in-state status penalizes them on account of—and, in the University's own view, to the extent of—their partial income tax exemption granted by the international agreements. It thereby burdens, undermines, and interferes with the accomplishment of an important objective of those agreements, in violation of the Supremacy Clause.

In short, by treating G-4 visaholders who have treaty-based tax exemptions and who are domiciled in Maryland differently from other state domiciliaries, largely on account of their tax exemption, the University's policy is inconsistent with the federal determination that these visaholders are entitled *both* to be domiciled in this country *and* to be exempt from income taxes on their official salaries. That policy cannot stand under the Supremacy Clause.

III. THE UNIVERSITY'S IN-STATE POLICY, UNTIL JUNE 23, 1978, CREATED AN UNCONSTITUTIONAL IRREBUTTABLE PRESUMPTION, IN VIOLATION OF THE DUE PROCESS CLAUSE.

The Court need not reach this due process issue unless it disagrees with our position on both the equal protection and the Supremacy Clause issues. In that event, however, we submit that it should still uphold the limited decision of the lower courts that, until the Clarifying Resolution of June 23, 1978, the University's In-State Policy denied G-4 visaholders due process of law under the principles of this Court's decision in *Vlandis* v. *Kline*, 412 U.S. 441 (1973).

A. *Vlandis* v. *Kline* Requires a Ruling That the University's Policy Violated the Due Process Clause Prior to June 23, 1978.

The basis of the lower courts' holding that the University's policy denied G-4 visaholders due process under *Vlandis* until June 23, 1978, is as follows: As in *Vlandis*, the University's policy purported to be concerned with domicile under state law as the test for in-state status, but it then denied to a group of individuals seeking to meet that test—G-4 and other nonimmigrant visaholders —any opportunity to prove that they did so, on the basis of a conclusive presumption that they could not have the requisite intent to establish Maryland domicile. As the courts found, that conclusive presumption was not universally true for G-4 visaholders, and so it denied them due process.

The University argues that while it supports the position that *Vlandis* should be overruled, "there are at least three theories under which this Court could reject the lower courts' irrebuttable presumption holding without overruling" *Vlandis* (Pet. Br. 34). Before discussing whether *Vlandis* should be overruled, we show the lack of merit of those three theories.

The University's first two theories are that the Court could (1) conclude that if the "policy is constitutional under the equal protection clause its operation is clearly permissible under the due process clause" (*id.*), or (2) "limit *Vlandis* to its precise circumstances" (*id.* at 35). The defect in both these theories is that they ignore the express holding of this Court in *Elkins* that, for due process purposes, this case is squarely governed by *Vlandis*:

> "Because petitioner makes domicile the 'paramount' policy consideration and because respondents' contention is that they can be domiciled in Maryland but are conclusively presumed to be unable to do so, this case is squarely within *Vlandis* as limited by [*Weinberger* v.] *Salfi* [422 U.S. 749, 771 (1975)] to

> those situations in which a State 'purports[s] to be concerned with [domicile, but] at the same time den[ies] to one seeking to meet its test of [domicile] the opportunity to show factors clearly bearing on that issue.' " 435 U.S. at 660 (P.A. 116a).

Thus, this Court has already decided that the validity of the University's policy (at least at that time) under the Due Process Clause is controlled by *Vlandis* (without regard to the equal protection issue) and that efforts to distinguish this case from *Vlandis* are not persuasive.

In its third theory, however, the University claims that this Court's subsequent decision in *Toll* in effect reversed its holding in *Elkins* and decided that *Vlandis* was inapplicable to this case and that no irrebuttable presumption ever existed, thus removing the issue from the case entirely and leaving the District Court to decide only the equal protection and Supremacy Clause issues (Pet. Br. 35-36). As the courts below recognized, that is a patent misreading of *Toll.*

In *Toll* this Court first took note of the Clarifying Resolution and stated that it appeared to remove the premise of *Elkins* that if G-4 visaholders could become Maryland domiciliaries, the University "would redraft its policy 'to accommodate' G-4 aliens . . . ." 441 U.S. at 461 (P.A. 160a). The Court then stated that "*if* domicile is not the 'paramount' policy consideration of the University, this case is no longer 'squarely within *Vlandis* as limited by *Salfi* . . . .' " 441 U.S. at 461-62 (P.A. 160a) (emphasis added). The Court did not decide *whether*, in light of the Clarifying Resolution, domicile was in fact any longer the "paramount" consideration; and it manifestly did not decide, as the University claims it did, that the resolution retroactively changed the "paramount" nature of domicile, and thus resolved the due process issue in the University's favor, for the period *prior to the date of the resolution.* The Court, in remanding, left those questions as among the "new is-

sues" to be "addressed in the first instance by the District Court." 441 U.S. at 462 (P.A. 160a).[28]

On remand, the District Court expressly found that until the Clarifying Resolution of June 23, 1978, the University's paramount purported concern in awarding in-state status under its policy "was with the Maryland law of domicile," and that "in-state eligibility hinged upon a determination of Maryland domicile according to *state law* principles" (P.A. 27a).[29] The court further found that the Clarifying Resolution did not retroactively change the University's paramount concern with domicile under state law for the period prior to that date, although it did for the period thereafter. The court therefore held that the due process issue was still governed by *Vlandis* for the period prior to June 23, 1978. The Court of Appeals agreed (P.A. 5a). That holding should be upheld (if the question is reached),

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[28] The University asserts that "if the Court thought that *Vlandis* still governed any of the rights and obligations of the parties in this case, it would have done what it said it would do, that is, consider the question of whether *Vlandis* as modified by *Salfi* should be 'overrule[d] or further limit[ed]'" (Pet. Br. 36). That conclusion does not follow at all. This Court was faced with a new resolution which the University claimed showed a different basis for its In-State Policy from the one which the Court had previously found it had. The Court wanted to give the District Court the first opportunity to hear that claim and to address the questions of whether and how that resolution may have affected the issues. Furthermore, it seems highly unlikely that this Court would have decided that the June 23, 1978 resolution rendered *Vlandis* inapplicable, contrary to its prior decision, without full briefing on that question. See p. 6, *supra*.

[29] The University had, until the resolution, consistently and repeatedly represented that its In-State Policy was based on the state law of domicile and that the reason why it prohibited G-4 visaholders from proving domicile was that, in its view, they could not have the requisite intent to establish Maryland domicile. See Addendum B hereto. This Court in *Elkins* clearly recognized that domicile was the basis of the University's policy. 435 U.S. at 658-60, esp. n.8 & 9 (P.A. 114a-116a, esp. n.8 & 9).

since the lower courts' finding that domicile was the paramount concern of the University until June 23, 1978, is not clearly erroneous,[30] and since this Court's decisions in *Elkins* and *Toll* made clear that if domicile *was* found to be "the 'paramount' policy consideration of the University," then this case is to that extent still "squarely within *Vlandis* as limited by *Salfi*."

B. *Vlandis* v. *Kline* Should Not Be Overruled.

The *amici curiae* Alabama *et al.* (Br. 4-10) and American Council on Education *et al.* (Br. 5-8) urge this Court to use the present case as a vehicle to overrule *Vlandis*. Indeed, that appears to be the primary interest of these *amici* in this case. First of all, in view of the fact that the due process issue is no longer an important issue in this case, as it provides simply an alternative ground for the judgment below and one that is limited to a two-year period from 1976 to 1978, this is clearly not an appropriate case for this Court to reach out to overrule one of its prior decisions. If, however, the Court should, by rejecting our equal protection and Supremacy Clause arguments, have to reach the limited due process issue, we submit that it should not overrule *Vlandis*. In fact, the Court's holding in that case, as carefully limited by *Salfi*, represents a proper interpretation of the Due Process Clause.

The Court in *Salfi* properly drew a distinction between enactments that condition benefits upon compliance with a flat, objective eligibility criterion on which individuals can present evidence (such as that involved in that case) and enactments (such as that involved in *Vlandis*) that purport to be concerned with a particular factual test (*e.g.*, residency or domicile) in conditioning benefits and

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[30] This finding was a factual inference drawn from the undisputed facts, and the "clearly erroneous" standard applies to such inferences. *Commissioner* v. *Duberstein*, 363 U.S. 278, 291 (1960); *United States* v. *Singer Manufacturing Co.*, 374 U.S. 174, 194 n.9 (1963).

then, on the basis of a conclusive presumption, deny certain individuals seeking to meet that test any opportunity to present and to have considered plainly relevant evidence of the fact deemed crucial. See 422 U.S. at 771-72. This Court's decisions and sound constitutional principles demonstrate that where the State makes clear its concern with a particular fact and makes that fact crucial to the entitlement to certain state benefits, its use of a conclusive presumption to deny to a certain class of people the opportunity to prove that fact, when that presumption is not universally true, denies that class procedural due process unless the State's difficulties in determining the crucial fact through individual hearings would outweigh the individuals' interests affected. See, *e.g.*—in addition to *Vlandis* and *Salfi*—*Stanley* v. *Illinois*, 405 U.S. 645 (1972); *Bell* v. *Burson*, 402 U.S. 535 (1971); *U.S. Dept. of Agriculture* v. *Murry*, 413 U.S. 508, 518 (Marshall, J., concurring), 524 (Rehnquist, J., dissenting) (1973).[31]

Of course, this does not mean that courts should go in search of such conclusive presumptions in all legislative enactments by looking behind the language of the enactments to the possible purposes for them. To do so would constitute undue judicial intervention into the legislative function and would, in the language of *Salfi*, turn the irrebuttable-presumption doctrine into a "virtual engine of destruction for countless legislative judgments . . . ." 422 U.S. at 772. But where it is clear from the face of the enactment or is otherwise obvious that the enactment has made a certain fact crucial and then has conclusively presumed the existence of that fact from another fact, which is not otherwise the subject of the legislative concern, then principles of procedural due process require a careful scrutiny of the enactment. Such a conclusive presumption can be justified only if

[31] The precedential and constitutional underpinnings of this principle are discussed at length in our brief in this Court in *Elkins*. Brief for Respondents in No. 77-154, at 41-66.

the State's difficulties in determining the crucial fact through individualized hearings would be substantial and would outweigh the individuals' interests affected. Otherwise, the denial of an individualized hearing on the fact deemed crucial is a denial of due process.

This analysis is not, as the *amici* suggest (Br. of Ala. *et al.* 5, 8; Br. of Amer. Coun. on Educ. *et al.* 6), a resurrection of the substantive due process concepts of the early part of this century. As the Court recognized in *Stanley* v. *Illinois*, *supra*, 405 U.S. at 652, this analysis scrutinizes means, not ends. It does not in any way prohibit or limit the State's ability to pursue certain stated objectives. Rather, it simply focuses on the means the State uses to achieve its objective and ensures that when the State conditions benefits on a particular fact, it does not without very good reason deny people's right to introduce, and to have duly considered, relevant evidence regarding that fact.[32]

Application of the *Vlandis* doctrine under this analysis is consistent with the subsequent decisions of this Court cited by the University and the *amici*.[33] It has also been

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[32] The *amici*'s claim that the challenged in-state scheme in *Vlandis* created no "property" or "liberty" interest deserving of due process protection (Br. of Ala. *et al.* 8; Br. of Amer. Coun. on Educ. *et al.* 6) is erroneous. The "property" interests necessary to invoke the due process guarantee include the concept of "entitlements" under the enactments involved (see *Goldberg* v. *Kelly*, 397 U.S. 254 (1970)); and it is the very point of the analysis here that the State has created a particular factual test (*e.g.*, residency or domicile) as the basis for the entitlement to benefits, but then has deprived certain people of that entitlement. Cf. *Arnett* v. *Kennedy*, 416 U.S. 134, 166-67, 177-78, 210-11 (1974). Furthermore, the in-state policies in *Vlandis* and this case created a "liberty" interest in in-state status for those who were determined to be resident or domiciled in the State, but then burdened that interest by denying certain individuals who could meet that test any opportunity for a hearing on that question. Cf., *e.g.*, *Vitek* v. *Jones*, 445 U.S. 480, 488-91 (1980).

[33] Those cases generally involved flat objective requirements, like that in *Salfi*, on which individuals could present evidence—not ir-

recognized by several commentators as a principled and useful constitutional interpretation,[34] and the due process principle underlying it has been applied by this Court in

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rebuttable presumptions purporting to be concerned with a particular fact and then precluding inquiry into that fact. For example, *New York City Transit Auth.* v. *Beazer*, 440 U.S. 568 (1979), involved a flat prohibition on transit employees from using drugs, including methadone. *Vance* v. *Bradley*, 440 U.S. 93 (1979), involved a flat objective requirement that persons covered by the Foreign Service retirement system retire at age 60. *Friedman* v. *Rogers*, 440 U.S. 1 (1979), involved a flat requirement that 4 of the 6 members of the state optometry board be members of the state optometric association. *First National Bank* v. *Bellotti*, 435 U.S. 765 (1978), struck down, under the First Amendment, a Massachusetts statute forbidding banks to spend money to influence votes except under certain conditions. That statute had been construed by the Massachusetts Supreme Judicial Court in such a way as to remove any claim that a conclusive presumption was involved. *Id.* at 772. *Ohio Bureau of Empl. Serv.* v. *Hodory*, 431 U.S. 471 (1977), involved a flat statutory rule that disqualified a worker from unemployment benefits if his unemployment was due to a labor dispute other than a lockout. That statute did not create any irrebuttable presumption. The other cases cited by the University (Pet. Br. 34) likewise involved such flat objective rules or exclusions. The only possible exception is *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), which involved a federal statute providing that if a miner had complicated and incurable black lung disease, he was deemed to be totally disabled and thus entitled to compensation. But that was not an irrebuttable presumption in the mold of those in *Vlandis* and *Stanley*, because in enacting that statute, Congress was not only concerned with the ultimate fact—total disability—but was equally concerned with the proximate fact or trait—complicated and incurable black lung disease. Indeed, "it was precisely this [latter] advanced and progressive stage of the disease that Congress sought most certainly to compensate." *Id.* at 23.

[34] See L. Tribe, *Structural Due Process*, 10 Harv. C.R.-C.L. L. Rev. 269, 287 (1975); B. Ackerman, *The Conclusive Presumption Shuffle*, 125 U. Pa. L. Rev. 761 (1977); J. Chase, *The Premature Demise of Irrebuttable Presumptions*, 47 Colo. L. Rev. 653, 705 (1976).

other areas of the law.[35] Hence, if the question is reached at all, *Vlandis* should be preserved as applied under this analysis.

IV. THE LOWER COURTS' HOLDING THAT REFUNDS ARE APPROPRIATE BECAUSE THE UNIVERSITY WAIVED ITS ELEVENTH AMENDMENT IMMUNITY WAS CORRECTLY BASED ON THE UNIVERSITY'S REPRESENTATIONS IN THIS CASE.

The District Court's order of May 30, 1980, besides reaffirming injunctive relief against enforcement of the University's In-State Policy, ordered the University to refund the difference between out-of-state and in-state charges to each class member whose status was determined by a G-4 visa for the fall semester of 1976 or for any subsequent semester and who would have been reclassified to in-state status but for the District Court's stay of its original order of July 13, 1976, pending appeal (P.A. 49a ¶ 6). The University's contention that this order violates the Eleventh Amendment was properly rejected by both courts below on the basis of the representations made by the University to obtain a stay of the original 1976 order.

The original order of July 13, 1976 (P.A. 98a) gave prospective relief only and thus raised no Eleventh Amendment issues. Had that order not been stayed, the University would immediately have had to cease charging affected class members the higher out-of-state tuition rates. Conversely, had a stay been granted without conditions, the University might have a valid argument that the Eleventh Amendment barred the District Court in 1980 from ordering refunds back to 1976. In fact,

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[35] For example, in administrative law, it is established that, even where an agency is not required to adopt a particular rule, once it does so it is bound by the Due Process Clause to follow that rule in a particular case. See, *e.g.*, *Wolff* v. *McDonnell*, 418 U.S. 539, 557 (1974); *Vitarelli* v. *Seaton*, 359 U.S. 535, 539-40 (1959); *Service* v. *Dulles*, 354 U.S. 363, 388 (1957).

however, the 1976 order was stayed after a motion by the University in which it represented specifically that "[p]laintiffs will not suffer substantial harm if a stay is granted" (R. 439), and after an oral hearing at which the University's counsel made the representation, incorporated into the stay order itself, that in the event the court's injunctive order was "finally affirmed on appeal," the University would refund the relevant difference in tuition to "each student whose status is currently determined by a G-4 visa and whose request for reclassification . . . would have been granted but for the stay" (P.A. 99a-100a). The obvious intent of this stay order was that, while the University took its appeal, it could continue to charge the respondent class out-of-state tuition rates, but that if the appeal was not successful, it would have to make affected class members whole, back through the fall semester of 1976. The court's order of May 30, 1980, merely implemented the terms of that stay order.

The University does not deny that the condition attached to the original stay order was an express waiver of Eleventh Amendment immunity. Rather, it argues (in its "first" and "third" points, Pet. Br. 37-38, 38-39) that the District Court's 1976 order was "effectively vacated" when this Court in *Toll* vacated the judgment of the Court of Appeals, and that thus that order can never be "finally affirmed on appeal" within the meaning of the original stay order. In addition, it argues (in its "second" point, Pet. Br. 38) that, in any event, refunds for the period 1976 to 1978 are inappropriate. Both arguments are without merit.

1. The University's contention that this Court in *Toll* "effectively vacated" the 1976 order is inconsistent with the Court's language and with the logic of the situation. Respondents were defending the 1976 order in this Court on the due process ground that had been adopted by the courts below *and* on the equal protection and Supremacy Clause grounds that neither court had ad-

dressed. As shown above (pp. 37-38), this Court did not decide the due process question in the University's favor; and it plainly did not decide the equal protection and Supremacy Clause issues. Rather, it simply concluded that the intervening Clarifying Resolution raised "new issues of constitutional law which should be addressed in the first instance by the District Court." 441 U.S. at 462 (P.A. 160a). Accordingly, it "vacate[d] the judgment of the Court of Appeals"—not the judgment of the District Court—and "remand[ed] to the District Court for further consideration" in light of its opinion in *Elkins*, the Maryland Court of Appeals' opinion, and the Clarifying Resolution. *Id.* This Court thus left it up to the District Court to decide whether, in light of the resolution, the due process ground still justified the injunction and, in any event, whether the equal protection or Supremacy Clause arguments did so. It surely would not have vacated the 1976 order—and deprived respondents of rights accruing under it—without addressing the various alternative grounds supporting it.

The University's contention that the case could not have been remanded for reconsideration without vacating the 1976 order (Pet. 27) ignores the broad authority granted by 28 U.S.C. § 2106[36] and the fact that this Court has often remanded cases for reconsideration without vacating the underlying order or judgment. *E.g.*, *Goldberg* v. *United States*, 425 U.S. 94, 111-12 (1976), and *Campbell* v. *United States*, 365 U.S. 85, 98-99 (1961).[37] Accordingly, the 1976 order was "finally

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[36] "The Supreme Court . . . may . . . require such further proceedings to be had as may be just under the circumstances."

[37] The University cities *Duke Power Co.* v. *Greenwood County*, 299 U.S. 259, 268 (1936), for the proposition that an appellate court cannot leave in effect the final decree of a district court and at the same time reinvest that court with jurisdiction to retry the case (Pet. Br. 37-38). But the statement in question was limited to the peculiar facts of that case, where the court of appeals had

affirmed on appeal" when the District Court reaffirmed that order (though in part on different legal grounds) in 1980, or will be "finally affirmed on appeal" if the judgment below is affirmed here.[38]

If the University's position were correct, the result would be illogical and unfair. If this Court affirms the judgment below on the invalidity of the In-State Policy, then in *not one court* will the University have prevailed on the merits. The 1976 order will have been upheld as properly entered. It is incredible, under these circumstances, that the University should contend that it cannot now or ever be ordered to pay the money it expressly promised in 1976 to refund, if necessary. The upshot of this argument is that the University won the entire case up to May 30, 1980, regardless of the decision on the substantive issues, since it can never be ordered to pay back the monies collected between the original order and that date. Both the District Court, which had heard argument on and signed the original stay order, and the Court of Appeals, which had adopted that stay order when it stayed its own mandate (P.A. 103a-104a), properly rejected this unreasonable inter-

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issued an ambiguous remand order which had been misunderstood by the district court. No stay of the district court order had been issued in that case, and there was no issue, as here, of rights that might be lost by virtue of the Eleventh Amendment if the district court order were vacated. In any event, that decision preceded the enactment of 28 U.S.C. § 2106, as well as the adoption of Rule 60, Fed. R. Civ. P., which allows a district court to reconsider a matter without upsetting its original order.

[38] Since the District Court stayed the 1980 order pending appeal on the same grounds as it had stayed the 1976 order (P.A. 52a; see also P.A. 3a-10a), there is little practical difference between the two approaches. The first approach makes sense because (a) the further District Court proceedings were mandated by this Court and thus may be considered a continuation of the initial appeal and (b) neither this Court nor the Court of Appeals retained jurisdiction of the case, so a new appeal had to be taken by the University from the 1980 order.

pretation of the order; and the University's continued effort to escape the manifest intent of its representations should not be countenanced by this Court.

2. Finally, the University suggests that, at the very least, refunds for the period after June 23, 1978, should not have been ordered, because "the in-state policy had been declared constitutional on due process grounds after that date . . . and was not declared unconstitutional on different grounds until May 30, 1980" (Pet. Br. 38). This argument, made without any citation of authority, ignores the procedural posture of the case and was properly rejected by both courts below.

The District Court declared the In-State Policy unlawful and enjoined its application in 1976. The fact that the legal ground announced at the time—due process—was later changed for the period after June 23, 1978—to equal protection and supremacy—is irrelevant. Respondents were entitled to defend that 1976 order on any legal grounds that supported it (see, *e.g.*, *Colautti* v. *Franklin*, 439 U.S. 379, 397 n.16 (1979)), and they did so. An order that is later affirmed on different grounds still stands from the time it was entered.

The University's argument might make sense if the University had in 1978 adopted a *new* in-state policy that was no longer covered by the 1976 order. But the University admits that the Clarifying Resolution did not change the In-State Policy or result in a new policy (Pet. Br. 8, 37), and the resolution itself states that it "reaffirms" the original In-State Policy (P.A. 174a ¶ 4).[39] Ac-

[39] Although the District Court, in finding that the policy did not create an impermissible irrebuttable presumption after June 23, 1978, did speak of a "revised In-State Policy" (P.A. 28a), those words must be understood in the irrebuttable-presumption context, where the critical issue is the " 'paramount' concern" of the policy (P.A. 24a). In any event, since the District Court later considered (J.A. 84A, 85A-86A ¶ 6) and rejected (P.A. 49a ¶ 6) the possibility of not ordering refunds for the period from June 23, 1978, to May 30, 1980, the court necessarily rejected the contention that the Clarifying Resolution took the In-State Policy out from under the July 13, 1976 injunction.

cordingly, since the In-State Policy before and after June 23, 1978, was subject to the 1976 order, the University must make refunds for the entire period after that order (if it does not prevail in this Court), because it waived Eleventh Amendment immunity by agreeing to the conditions in the stay order of August 3, 1976.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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ADDENDA

ADDENDUM A

International Organizations Located in the United States to Which the G-4 Visa Category Applies, and Whose Alien Employees Have, Under Treaties or International Agreements, Exemptions from Federal and State Income Tax on Their Official Compensation [1]

Inter-American Development Bank:

Agreement Establishing the Inter-American Development Bank, *done* April 8, 1959, art. XI, sec. 9(b), 10 U.S.T. 3029, T.I.A.S. No. 4397 (entered into force December 30, 1959) ("No tax shall be levied on or in respect of salaries and emoluments paid by the Bank to . . . employees of the Bank who are not local citizens or other local nationals.").

International Bank for Reconstruction and Development (World Bank) (and its affiliated organizations):

Articles of Agreement of the International Bank for Reconstruction and Development, *opened for signature* December 27, 1945, art. VIII, sec. 9(b), 60 Stat. 1440, T.I.A.S. No. 1502 (entered into force December 27, 1945) ("No tax shall be levied on or in respect of salaries of employees of the Bank who are not local citizens, local subjects, or other local nationals."), incorporated in 22 U.S.C. § 286h.

Articles of Agreement of the International Finance Corporation, *done* May 25, 1955, art. VI, sec. 9(b),

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[1] A listing of all the international organizations to which the G-4 visa category applies—or would apply if the particular organization had an office or staff in the United States—appears in 9 Department of State, *Foreign Affairs Manual* § 41.50, Exhibit I (pages dated 3/26/81 & 10/1/80), an earlier edition of which is reprinted in 6 C. Gordon & H. Rosenfield, *Immigration Law and Procedure* § 41.50 at 32-105 to 32-107 (1981). See also Historical Note following 22 U.S.C.A. § 288 (West 1979 & 1981 Supp.) (organizations entitled to privileges and immunities under the International Organizations Immunities Act).

7 U.S.T. 2197, T.I.A.S. No. 3620 (entered into force July 20, 1956) ("No tax shall be levied on or in respect of salaries and emoluments paid by the Corporation to . . . employees of the Corporation who are not local citizens, local subjects, or other local nationals.").

Articles of Agreement of the International Development Association, *done* January 26, 1960, art. VIII, sec. 9(b), 11 U.S.T. 2284, T.I.A.S. No. 4607 (entered into force September 24, 1960) ("No tax shall be levied on or in respect of salaries and emoluments paid by the Association to . . . employees of the Association who are not local citizens, local subjects, or other local nationals.").

Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (creating the Centre for the Resolution of Investment Disputes), *done* March 18, 1965, art. 24, sec. 2, 17 U.S.T. 1270, T.I.A.S. No. 6090 (entered into force October 14, 1966) ("Except in the case of local nationals, no tax shall be levied . . . on or in respect of salaries, expense allowances or other emoluments paid by the Centre to officials or employees of the Secretariat.").

International Monetary Fund:

Articles of Agreement of the International Monetary Fund, *opened for signature* December 27, 1945, art. IX, sec. 9(b), 60 Stat. 1401, T.I.A.S. No. 1501 (entered into force December 27, 1945) ("No tax shall be levied on or in respect of salaries and emoluments paid by the Fund to . . . employees of the Fund who are not local citizens, local subjects, or other local nationals."), incorporated in 22 U.S.C. § 286h.[2]

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[2] Three other organizations to which the G-4 visa category would apply—the African Development Fund, the Asian Development

United Nations:

> Convention on the Privileges and Immunities of the United Nations, *done* February 13, 1946, art. V, sec. 18(b), 21 U.S.T. 1418, T.I.A.S. No. 6900 (entered into force April 29, 1970) ("Officials of the United Nations shall . . . be exempt from taxation on the salaries and emoluments paid to them by the United Nations"; U.S. ratification subject to reservation providing that U.S. retains the right to tax salaries paid to United States nationals, and aliens admitted for permanent residence.).[3]

Bank, and the Customs Cooperation Council—have similar tax exemptions under treaties or international agreements, but we understand that these organizations do not have offices or staff in the United States. For the text of these tax exemptions, see Agreement Establishing the African Development Fund, *done* November 29, 1972, art. 49, para. 4, 28 U.S.T. 4547, T.I.A.S. No. 8605 (entered into force November 18, 1976); Agreement Establishing the Asian Development Bank, *done* December 4, 1965, art. 56, para. 2, 17 U.S.T. 1418, T.I.A.S. No. 6103 (entered into force August 22, 1966); Convention Establishing a Customs Cooperation Council, *done* December 15, 1950, Annex, art. VI, sec. 17(b), 22 U.S.T. 320, T.I.A.S. No. 7063 (entered into force November 5, 1970).

[3] This Convention on the United Nations thus provides an exception to the general rule, cited in the text of this brief (p. 2, n.2, & p. 25, n.21), that *immigrant* visaholders employed by international organizations with a treaty-based tax exemption are also entitled to that exemption.

The University incorrectly states that G-4 employees of three other organizations—the International Coffee Organization, the North Atlantic Treaty Organization, and the International Court of Justice—have treaty-based tax exemptions (Pet. Br. 29 n.22). The treaty establishing the International Coffee Organization contains no exemption for employees from taxation by the United States or its subdivisions. See International Coffee Agreement, 1976, *done* December 3, 1975, art. 23, para. 2, 28 U.S.T. 6401, T.I.A.S. No. 8683 (entered into force August 1, 1977). As to NATO and the International Court, neither organization is one to which the G-4 visa category applies. See lists cited in note 1 of this Addendum, *supra*.

ADDENDUM B

The University's Representations Regarding Domicile as the Basis of the University's In-State Policy Prior to June 23, 1978

1. *Representations in the Initial Proceedings in the District Court*

In describing the University's In-State Policy:

> "The Defendant University *distinguishes between domiciliaries and non-domiciliaries* of the State of Maryland in the amount of tuition, room and other miscellaneous charges assessed." R. 215 (emphasis added).

> "[The structure of the In-State Policy] incorporates the determination that *under the law and definition of domicile as established and applied by Maryland courts*, non-immigrant aliens cannot display the intent to permanently reside within the State which is requisite to establishing Maryland domicile." R. 217 (emphasis added).

> "[Each plaintiff was] classified as an 'out-of-state' student because his [or her] father, upon whom he [or she] is financially dependent, is not domiciled in Maryland." R. 220.

In responding to the plaintiffs' irrebuttable-presumption argument:

> "Defendants have denied Plaintiffs 'in-state' status *based on an evaluation of their domicile under Maryland law*: the existence of a G-4 visa is merely a single operative fact, *albeit paramount, which is placed in the context of what Defendants have determined to be the definition of domicile established by the Maryland courts.*" R. 231 (emphasis added).

In responding to the plaintiffs' equal-protection argument:

> "[T]he most cursory examination of the In-State policy shows that it is *predicated upon the test of domicile*, and cuts squarely across the issue of alienage." R. 232 (emphasis added).
>
> "This distinction [between citizens and immigrant aliens, on the one hand, and non-immigrant aliens, on the other,] was *based upon a reading of the Maryland law of domicile* in conjunction with the terms and conditions of the non-immigrant visas described in 8 U.S.C. § 1101(a)(15)(A) through (L), a determination thereby having been made that non-immigrants do not have the intent requisite for establishing Maryland domicile. This distinction in the 'In-State' policy thereby clearly relates to *the overlying purpose of the policy which is to grant in-state status . . . to domiciliaries of this State.* That State University's [*sic*] can establish such 'residency' or 'domicile' policies and make distinctions between domiciliaries and non-domiciliaries is well established and beyond dispute." R. 233 (emphasis added).
>
> "[T]he Defendants' 'In-State Policy' creates two classes of persons, indistinguishable except with respect as to whether they are or are not domiciliaries of Maryland. The same test, *the test of domicile*, is applied to all persons, citizens and aliens (including 'G-4' aliens) alike." R. 334 (emphasis added).

In arguing that the plaintiffs had no standing to sue:

> "[T]he relevant issue in the determination of [plaintiffs'] 'out-of-state' status was the domicile of their respective fathers." R. 238.

In arguing that the District Court should abstain from deciding the unresolved "core" question whether G-4

visaholders could establish domicile in the State under Maryland law (R. 239-43, R. 340):

> "[T]he Defendants' 'In-State Policy' is structured upon and reflects Defendants' understanding of the Maryland common law of domicile." R. 340.
>
> "A judicial determination in the negative [by the Maryland courts on the question whether G-4 visaholders could be domiciled in Maryland] would foreclose their Constitutional and statutory arguments; *a determination in the affirmative would require the University's Board of Regents to rewrite the In-State policy to accommodate this category of domiciliaries.*" R. 240 (emphasis added).

In the conclusion to its Reply Memorandum:

> "[T]he Defendants' 'In-State Policy' was undisputably based on the 'nonsuspect' criteria of domicile." R. 345.

2. *Representations in the Court of Appeals on the Initial Appeal (No. 76-2049)*

Describing the University's In-State Policy:

> "Under what is basically a two-step determination, the University will grant in-state status only 'to United States citizens and to immigrant aliens lawfully admitted for permanent residence in accordance with the laws of the United States.' . . . For students . . . who are not United States citizens or permanent resident aliens or financially responsible parents holding similar non-immigrant status, the University does not further examine other domiciliary factors such as whether or not such individuals pay taxes. . . . This is because individuals who do not meet the first step of the process *cannot have the requisite intent to establish Maryland domicile.*" Appellant Br. 4-5 (emphasis added).

In responding to the appellees' equal-protection arguments:

> "[T]he challenged classification is one *based on domicile* rather than alienage." Appellant Reply Br. 14 (emphasis added).

In arguing that the District Court should have abstained:

> "[T]he principal issue in the case . . . [was] whether a G-4 visa holder can establish domiciliary intent . . . ." Appellant Br. 18.

> "If state courts hold that Maryland's law of domicile does not preclude a G-4 alien from establishing domiciliary intent for tuition purposes, the University will have to weigh other domiciliary indicia such as those eight set forth in the In-State Policy and determine the status of the students on that basis. This is precisely the relief ordered by the lower court—but without the adjudication of a federal constitutional issue." Appellant Br. 16-17.

3. *Representations in this Court in Elkins* v. *Moreno* (*No. 77-154*)

In describing the In-State Policy:

> "Like most other public institutions of higher education, the University of Maryland *bases its award of in-state status on domicile.*" Petitioner Br. 11 (emphasis added).

> "Because it views *nonimmigrant aliens as being under a legal disability which precludes the intent to be domiciled in Maryland*, the University awards in-state status only to 'United States citizens and . . . immigrant aliens lawfully admitted for permanent residence in accordance with the laws of the United States.'" *Id.* (emphasis added).

In the Summary of Argument:

> "[The In-State Policy] is *predicated upon domicile* . . . ." *Id.* at 17 (emphasis added).

In answering the respondents' irrebuttable-presumption argument:

> "[T]he University's in-state policy . . . *is directed at* and disadvantages *only nondomiciliaries* . . . ." *Id.* at 30 (emphasis added).
>
> "The University's in-state policy *tracks the State's law of domicile* to classify nonimmigrant aliens as nondomiciliaries." *Id.* at 34 (emphasis added).

In answering the respondents' equal-protection argument:

> "In terms of the benefit denied by the classification, it is *predicated essentially on domicile* with aliens on both sides of the classification." Petitioner Reply Br. 13 (emphasis added).